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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 412

MARGARET SHIELDS, AND HENRY K. SHIELDS, BY HIS MOTHER AND NEXT FRIEND, MARGARET SHIELDS, PETITIONERS

v.

UNITED STATES OF AMERICA, WAR SHIPPING ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania (R. 193a) is reported at 73 F. Supp. 862. The majority and dissenting opinions in the United States Court of Appeals for the Third Circuit (R. 203) are reported at 175 F. 2d 743.

JURISDICTION

The judgment of the Court of Appeals was entered on May 24, 1949 (R. 211). A petition for rehearing was denied on June 15, 1949 (R. 213). By order of Mr. Justice Black, the time for filing the petition for a writ of certiorari was extended to and including October 21, 1949 (R. 214). The petition for a writ of certiorari was filed on October 20, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether both courts below erred in concluding from the facts of this case that respondent did not breach its duty to provide petitioner with a safe place to work.

2. Whether the negligence of the winchman—for which his employer, the contracting stevedore, was liable, and for which the stevedore settled with petitioner for the sum of $30,000—was also imputable to respondent as shipowner.

STATEMENT

Petitioner Henry K. Shields [1] was a civil-service employee of the United States aboard the *S. S. Hannibal Hamlin,* a vessel owned and operated by the United States through the war Shipping Administration and husbanded by a general agent appointed under the wartime standard form

[1] Shields being a minor when this suit began, the libel was filed on his behalf by his mother and next friend, Margaret Shields.

GAA 4-4-42 agreement.[2] Shields was severely injured when a winch he was oiling was negligently started by an employee of a contracting stevedore. He brought two actions—one at law against Sobelman and Company, the contracting stevedore, the other the present suit in admiralty against the United States. The suit against Sobelman was tried first, and, at the close of petitioner's case, was settled by payment to him of $30,000. (R. 193a.) In the present action, the United States has been held liable to petitioner for sums covering maintenance, cure and wages (R. 198a-200a, 205-207). The courts below have held, however, that the United States did not breach its duty as shipowner to provide petitioner with a safe place to work, and that the United States is not liable, in addition to the longshoreman's employer, for the longshoreman's negligence. Petitioner contends here that these last rulings, denying his right to recover from the United States for unseaworthiness or for the winchman's negligence, were erroneous.

On or about September 19, 1944, petitioner reported for duty as an oiler on the *Hannibal Hamlin* (R. 8a, 73a). Prior to that date, he had completed a three-month course of training at a Maritime

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[2] Employment on a vessel operated by the War Shipping Administration as successor to the Maritime Commission made petitioner an unclassified civil-service employee of the United States. Civil Service Rules, Schedule A, sec. xxi(1); Exec. Order No. 9004, 7 Fed. Reg. 2; Exec. Order No. 9054, 7 Fed. Reg. 837; 5 C.F.R. 1943 Cum. Supp., p. 1488, sec. 50.21. The text of WSA Form GAA 4-4-42 is found in 7 Fed. Reg. 7561-7562, 46 C.F.R., 1943 Cum. Supp., p. 11427, sec. 306.44.

Commission school for merchant seamen and had served for a year as an oiler on tank ships, oiling winches similar to the one involved in this case (R. 6a-8a, 74a, 44a-45a). After reporting to the *Hannibal Hamlin,* petitioner was assigned to oiling the ship's deck winches and spent his working hours on September 20 and 21 performing that task (R. 92a). On September 22, petitioner was again ordered to oil the deck winches (R. 9a). He had oiled four sets of winches and the starboard winch at No. 2 hatch and was oiling the port winch at No. 2 hatch when he was injured (R. 10a).

There were two winches at No. 2 hatch, one on either side of the deck, each with a throttle and a brake (R. 196a). To the throttles of these winches the longshoremen had attached wooden handles so constructed that an operator, standing between them, could face the hatch and operate both throttles (R. 196a). This method of rigging winches was commonly employed by stevedores, particularly in Philadelphia and New York (R. 66a-67a, 124a, 146a-147a).[3] There was testimony

[3] The petition for certiorari (Pet. 2) states that the "general practice" required a longshoreman at each winch. The record, however, supports the contrary statement above, while the testimony in the record upon which petitioner relies (R. 138a) indicates only that union by-laws required an operator for each winch and that this requirement was observed only "at times." The petition also states (Pet. 20-21) that a single winchman "was * * * doing the work of three men, since he could handle both winches and he no longer needed the signalman to direct him from the hatch." It should be pointed out here that there was actually a signalman in this case performing his customary function (R. 136a-137a).

that the use of one operator for both winches afforded more coordination between the winches than would two operators and increased the safety of men working in the hold (R. 136a). While a winchman operating both winches was unable to reach the brakes without moving, winches were ordinarily stopped by manipulation of their throttles (R. 147a). In addition to its throttle, each winch, as the district judge found, "was supplied with a separate steam valve, part of the permanent mechanism, which shut off the steam between the engine room and the throttle and which it was the customary practice for an oiler to close before he began oiling any particular winch" (R. 197a).

On the day of petitioner's injury, the ship's first assistant engineer, who had assigned petitioner to oiling the winches, came to observe him as he began to oil the starboard winch at No. 2 hatch (R. 115a). This officer testified that he turned off the steam valve, thus making it impossible for the winch to be started by use of the throttle alone, and cautioned petitioner to do the same before oiling any other winch (R. 115a, 121a, 129a-130a). Petitioner denied that he had been so cautioned by the engineer, admitting, however, that he knew of the steam valve and knew that he had the right to turn it off before oiling the winch (R. 55a-58a). The first assistant engineer also testified that it was improper to reach through the flywheel to oil the winch and that petitioner

had not done so when oiling the starboard winch (R. 117a-120a).

Before oiling either of the winches at No. 2 hatch, petitioner told the winch operator (an employee of Sobelman and Company) to turn off their throttles, which the latter did (R. 10a). Then, after he had oiled the starboard winch, petitioner told the operator that he was going over to oil the port winch, and the operator, petitioner testified, "said all right, or O.K." (R. 12a-13a, 50a). Without turning off the steam valve, petitioner proceeded to oil a bearing on the port winch, reaching his left hand through an opening in the flywheel in order to do so (R. 13a, 14a, 51a, 56a). While petitioner was thus engaged the winch operator, without looking to see whether the oiling had been completed, suddenly started the winch (R. 13a). Petitioner's left hand was so severely injured as to require amputation; his right hand, with which he reached in to free his left, was also injured and, to some extent, permanently impaired (R. 193a).

The district court concluded, in holding that petitioner was not entitled to recover damages in this action, that "respondent did not fail in any duty to supply a safe place for the libellant to work" (R. 198a). The court rejected petitioner's contention that the method of rigging the winches was unsafe, pointing out that it was customary for an oiler to shut off the steam before oiling a winch. Numerous power-driven machines, the

court observed, demand of a workman that he pull a switch or close a valve before working on them, and "the employer's duty to furnish a safe place to work is fully met if the switch or valve is there and the man knows how to use it" (R. 197a). Finally, the court held that the United States was not liable for the negligence of the longshoremen, employees of the independent contractor Sobelman and Company (R. 198a). On appeal, the court below affirmed these rulings of the district court with one judge dissenting (R. 203-210).

ARGUMENT

1. There is no controversy here over the long-settled rule that a shipowner is under a non-delegable duty to provide his seamen with a seaworthy ship and safe appliances. It is equally undisputed that the shipowner cannot escape liability for breach of this obligation on the ground that a seaman's own negligence or the negligence of a stevedore contributed to his injury. The decision below does not rest, as petitioner asserts, upon a refusal to apply these established rules. It is based, rather, upon the clearly stated and amply supported conclusion of two courts that "respondent did not fail in any duty to supply a safe place for the libellant to work" (R. 198a, 204-205). Whether or not the place in which petitioner worked was a safe one is a question of fact. *Mahnich* v. *Southern S. S. Co.*, 321 U.S. 96, 98. We submit that the concurrent resolution of this

question by both lower courts is not an appropriate subject for review by this Court *Id.* at 98-99; *Just* v. *Chambers,* 312 U.S. 383, 385.

a. The district court found (R. 195a, 196a-198a) from the evidence which has been summarized above that three causes conspired to produce petitioner's injury: (1) his own failure to take the customary and expectable precaution of shutting off the steam valve, which would have made it impossible for the winchman to start the machinery; (2) his unnecessarily dangerous and improper thrusting of his hand through the flywheel in order to accomplish the oiling in which he was engaged; (3) the winchman's negligence in starting the winch after he had been told by petitioner that it was about to be oiled.[4] That this combination of negligent actions could and did result in his injury affords no basis for petitioner's contention that the rigging of the winches was unsafe.

In many work situations, as the district court pointed out, workers are required to take known and simple precautions for their safety. By failing to take such a precaution here, petitioner made it possible for the negligence of another to injure him. The situation thus presented to the courts below was not like that in *Socony Vacuum Oil Co.*

[4] The parties agree (see Pet. 30) in accepting the finding that the winchman was negligent, and petitioners' recovery of a $30,000 settlement from the winchman's employer (R. 152a-153a) is presumably explained by that negligence. For discussion of the contention that the United States is also liable on this ground, see pp. 14-16, *infra.*

v. *Smith,* 305 U.S. 424, where the seaman was confronted with two devices for performing his task—one safe, the other unsafe. Here there was but a single appliance, safe if correctly employed. Used improperly, it became a thing of danger. But such improper use does not alter the fact that petitioner had been supplied with reasonably safe equipment and a safe method of operation.[5] Cf. *Vileski* v. *Pacific-Atlantic S. S. Co.,* 163 F. 2d 553 (C.A. 9); *Pittsburgh S. S. Co.* v. *Palo,* 64 F. 2d 198 (C.A. 6); *Kreger* v. *Baltimore & O. R. Co.,* 25 F. 2d 728 (C.A. 3); *United States Steel Products Co.* v. *Noble,* 10 F. 2d 89 (C.A. 2).

Petitioner urges, however, that, had the winches not been equipped with extension handles on their throttles, the winchman would have stood at the rear of the winch and would have seen petitioner, thus avoiding the accident. It should be noted in this connection that petitioner testified at the trial against Sobelman and Company, the winchman's employer, that the winchman, already notified that petitioner was about to oil the winch, "certainly could have seen" petitioner had he turned his head

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[5] The dissenting opinion below, while it cites *Socony-Vacuum Co.* v. *Smith, supra,* demonstrates the reason for the inapplicability of that decision here. The dissenting judge disagreed (R. 209-210) with the majority's approval of the finding that the ship was seaworthy. He then went on to write (R. 210) that the "majority opinion gives no effect to this principle [of *Socony-Vacuum*] since it takes the view that the shipowner was not negligent in any particular and that the vessel was seaworthy in all respects." The principle of *Socony-Vacuum* could have "no effect"—was irrelevant—in view of the factual finding of seaworthiness.

and looked (R. 13a). It should also be noted that the record before this Court by no means makes clear what the winchman's line of vision would have been had he stood at the rear of the winch; on the record, petitioner's confident insistence that the winchman would necessarily have seen him is at best somewhat speculative. But, assuming the correctness of petitioner's assertion, it demonstrates only that the accident in this case could have been avoided. The employer's duty to provide a safe place to work is, however, not the impossible duty of providing a place that is accident-proof. It is surely not a duty to foresee the fortuitous coincidence of two such independently negligent acts as occurred here. Petitioner bore the burden below of showing that the condition of which he complained presented some reasonably foreseeable possibility of the type of injury he suffered. See *Brady* v. *Southern Ry. Co.*, 320 U.S. 476, 483-484; *Jackson* v. *Pittsburgh S. S. Co.*, 131 F. 2d 668 (C.A. 6); *The Baymead*, 88 F. 2d 144, 145, 146, 147 (C.A. 9). Having failed to make this showing, he was properly denied recovery.

b. Petitioner repeatedly characterizes as "makeshift" the extension handles on the winch throttles (Pet. 4, 13, 15, 20), suggesting that they constituted a deviation from the "general practice" of employing an operator on each winch (Pet. 20). It is appropriate, therefore, to stress the fact that the method of operation involved here appears

from the record to be widely used, especially in New York and in Philadelphia where the events involved in this case transpired. Insofar as the question of conventionality *vel non* is relevant in determining whether a given method is safe, the evidence of customary practice in this case lends added support to the decision below. See *Southern Pacific Co.* v. *Seley,* 152 U.S. 145; *Metropolitan Coal Co.* v. *Howard,* 155 F. 2d 780 (C.A. 2); *Grammer* v. *Mid-Continent Petroleum Corp.,* 71 F. 2d 38 (C.A. 10), certiorari denied, 293 U.S. 571.

2. Petitioner, conceding the general rule that an employer is ordinarily not liable for the negligence of an independent contractor or his servants, urges (Pet. 23-33) that the negligence of the winchman in this case is imputable to the United States as shipowner. There is no question, of course, that the winchman's employer, the independent contractor Sobelman and Company, was vicariously liable to petitioner, who has received a settlement of $30,000 on that ground. But the argument for the existence of the liability asserted here is without foundation.

a. As an exception to the general rule of nonliability for the negligence of an independent contractor, a number of courts have held that one "who employs an independent contractor to do work *which is inherently dangerous to others* is subject to liability for bodily harm caused to them by the contractor's failure to exercise reasonable

care to prevent harm resulting from the dangerous character of the work." *Restatement, Torts,* § 427 (emphasis supplied); *American Pacific Whaling Co.* v. *Kristensen,* 93 F. 2d 17 (C.A. 9);[6] *City of Joliet* v. *Harwood,* 86 Ill. 110; *Railroad Co.* v. *Madden,* 77 Kan. 80; cf. *Weinman* v. *de Palma,* 232 U.S. 571, 576. *Contra: Silveus* v. *Grossman,* 307 Pa. 272. Petitioner, misconceiving the nature of this exception, relies upon it here.

The cases applying the exception invariably emphasize the fact that the work involved must be "inherently" or "intrinsically" dangerous. It must be work "such as blasting or burning or spraying poison or loosing dangerous gas, under circumstances in which injury to others is practically certain unless proper precautions are taken." *Berman* v. *Greenberg,* 314 Mass. 540, 543. While the quoted enumeration is, of course, not exhaustive, it sufficiently indicates the character of the exceptional rule of liability under discussion; it is a rule designed to prevent one who

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[6] This case and one other (*Jacob Doll & Sons, Inc.* v. *Ribetti,* 203 Fed. 593 (C.A. 3)) are the only two of the eight cases petitioner cites in support of his second argument which could conceivably be relevant here. The others merely hold that a non-delegable duty—whether it be the employer's duty to provide a safe place to work (*Toledo Brewing & Malting Co.* v. *Bosch,* 101 Fed. 530 (C.A. 6); *The Magdaline,* 91 Fed. 798 (E.D. N.Y.); *Wilczynski* v. *Penna. R. R. Co.,* 90 N.J.L. 178; *Mullan* v. *Philadelphia & Southern Mail Steamship Co.,* 78 Pa. 25) or a duty expressly assumed by contract (*Water Co.* v. *Ware,* 16 Wall. 566; *Maryland Dredging & C. Co.* v. *State of Maryland,* 262 Fed. 11 (C.A.4))—cannot be avoided by entrusting its performance to an independent contractor. Cf. footnote 7, *infra,* p. 13.

would work with extremely risky materials or processes from delegating his responsibility for the extraordinary precautions required. It has, accordingly, been sharply limited in its application. See Prosser, *Torts,* (1941) p. 488.[7]

And so, in the one case we have found where an argument like petitioner's was made, the court refused to hold the work of stevedores so intrinsically dangerous as to impose liability upon a shipowner for the negligence of a longshoreman. *Joseph R. Foard Co.* v. *State of Maryland,* 219 Fed. 827 (C.A. 4). The same result has been reached in cases involving mining (*Laffery* v. *Gypsum Co.,* 83 Kan. 349), unloading of sheets of steel from a boxcar (*Union Tank & Supply Co.* v. *Kelley,* 167 F. 2d 811 (C.A. 5)), taking down a

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[7] As stated by petitioner, the rule in question "is, that where an employer engages an independent contractor to perform a job which *has an element of danger to, or has a bearing on the safety of the servants of the employer,* * * * the negligence of the independent contractor under those circumstances is imputable to the employer." (Pet. 30; emphasis supplied). If this statement means that an employer is liable for failure to provide a safe place or method of work, even where the unsafeness results from the negligence of an independent contractor, then we concur in it and would merely point out it is irrelevant here. Here we are concerned, not with the safety of the place or method of work, but with the negligent act of a winchman (Compare petitioner's First Point—Pet. 14-23—and our Point 1, *supra*). If, however, the language we have italicized in petitioner's statement is read to mean that an employer is liable for an independent contractor's negligence whenever the latter's work is such that a negligent act in the course of it may injure the employer's servant, then the statement is supported by none of the cases petitioner cites and by no other case we know. So understood, petitioner's statement would mean that it is impossible to escape liability for an independent contractor's negligence. This is not the law.

building wall (*Engel* v. *Eureka Club,* 137 N.Y. 100), and use of a gasoline-fired steam generating machine (*Berman* v. *Greenberg,* 314 Mass. 540). In cases of the type just cited the extraordinary degree of risk described as "intrinsic danger" is absent; only the failure to exercise ordinary reasonable care is likely to cause injury. Without detailing them again, we think it obvious that the facts of the present case bring it within this latter category.

We do not urge that the work of stevedores could never, in any conceivable circumstances, be characterized as "intrinsically dangerous" so as to invoke the rule upon which petitioner relies. We submit merely that the question whether a given job should be so described must depend upon the factual character of the job. Cf. *Blue Grass Fair Association* v. *Bunnell,* 206 Ky. 462; *Davis* v. *Summerfield,* 133 N.C. 325, 330-331 (a question for the jury). Here, in a case where the accident was clearly the result of a failure to exercise ordinary care, petitioner asks this Court to hold as a matter of law that stevedoring is always and everywhere intrinsically dangerous. This argument, without support in precedent and refuted by the record upon which it is based, has been sufficiently rehearsed and properly rejected in the two courts below.

b. Petitioner's claim that the winchman's negligence should be imputed to the United States is

not supported by either the logic or the policy of this Court's decision in *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85. In *Sieracki* this Court held that a shipowner is liable to an employee of an independent stevedoring company for injuries suffered as a result of the vessel's unseaworthiness. That holding does not suggest even remotely any basis for petitioner's view that the shipowner should now sustain an unprecedented liability for a negligent act of a stevedoring company employee, a liability appropriately and adequately borne by the stevedoring company itself.

The policy of the *Sieracki* decision—"that for injuries incurred while working on board the ship in navigable waters the stevedore is entitled to the seaman's traditional and statutory protections" (328 U.S. at 99)—stems from a recognition that the stevedore shares with the seaman the risks of the ship's unseaworthiness. *Id.* at 95. These risks, the Court pointed out, are ones which the stevedore's employer "ordinarily has neither right nor opportunity to discover or remove * * * and it is doubtful, therefore, that he owes to his employees, with respect to these hazards, the employer's ordinary duty to furnish a safe place to work, unless perhaps in cases where the perils are obvious or his own action creates them. If not, no such obligation exists unless it rests upon the owner of the ship." *Id.* at 95-96.

As the district court pointed out (R. 194a), no comparable considerations are present here. A

seaman or other party injured by a longshoreman's negligence can look for compensation to the stevedoring contractor, as petitioner has done. Thus, imposition upon shipowners of the unique liability for which petitioner contends would not only be a radical departure from the usual rules of vicarious liability, but would be impossible to justify as providing a mode of redress for persons otherwise remediless.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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